Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232

COMMENTS OF COLLEGIATE BROADCASTERS, INCORPORATED

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1. In this Notice of Proposed Rulemaking, the Commission seeks comment on a scheme to require broadcasters to record all material aired during the hours of 6 a.m. and 10 p.m., with recordings to be retained for a period of 60 to 90 days. The Commission's goal, to ensure a complete record before deciding to initiate enforcement proceedings following a complaint about programming, is laudable. However, the proposal does little to advance that goal, imposes significant financial and operational burdens on licensees, and is likely unconstitutional. For those reasons, Collegiate Broadcasters, Inc. ("CBI"), which represents member stations and students involved in radio, television, webcasting and other related media ventures, is filing these comments to oppose the proposed rule.

The Proposed Requirements Will Not Significantly Improve Commission Enforcement of 18 U.S.C. § 1464.

2. The Commission seeks comment on ways to improve the complaint and enforcement process. However, nothing in the Notice explains what specifically about the current process needs fixing. Stations, particularly college and university licensees, are already substantially in compliance with the rules governing obscene, indecent, or profane content. Current Commission guidelines place the *prima facie* evidentiary burden where it properly belongs in the American system of jurisprudence–on a complainant. There is no evidence presented in the Notice discussion that suggests that this burden is

onerous or that the current process impedes the ability of the Commission to commence enforcement against offenders in a meaningful way. There were 14,379 complaints filed with the FCC between 2000 and 2002. Barely 1% of complaints were dismissed for lack of sufficient information[1] and the FCC has conducted many successful[2] 18 U.S.C. § 1464 enforcement actions based on tapes or transcripts from listeners.

3. Any requirement such as this proposal is likely to have the undesirable effect of impairing the process. Putting the entire evidentiary burden on licensees will encourage frivolous complaints by lowering the bar for a potential complainant to the point where no real effort is involved on his or her part. Even if such harassing complaints are quickly dismissed, they will cumulatively require significant expenditures of resources by both the affected licensees and the Commission to respond. The result would be, in effect, a heckler's veto for any listener who simply does not like a station's programming, even when that programming serves a demonstrated interest in the local community and is in full compliance with applicable statutes and regulations. Therefore, CBI believes the complaint process needs to retain the existing evidentiary burden for the complaining party.

4. The regulations proposed under this Notice effectively penalize every licensee because of some unsubstantiated fear that they might violate existing Commission regulations, rather than sanctioning an individual licensee that has violated such regulations.

The Proposed Requirements Impose
Unacceptable Financial and Operational Burdens on College Station Licensees.

5. The Commission asks about the potential financial burden and broadcasters' existing recordkeeping practices. In preparing these comments, CBI surveyed its member stations, asking particularly about cost and implementation issues. Of the responding stations, only two reported

[1] In the Matter of Retention by Broadcasters of Program Recordings, *Notice of Proposed Rulemaking*, MB Docket No. 04-232, fn. 3 (citing Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004).
[2] "Success" in this context refers to a completed investigation, which may result in a forfeiture notice (for a violation) or a dismissal (when no violation occurred).

currently having a system (the recording and storage capability) to maintain comprehensive program recordings for longer than two weeks. Although one noted the internal usefulness of their system for dealing with listener complaints ("to prove we didn't do what they said we did"), the member did not indicate how often that took place. The other station voiced strenuous objection to using the recordings for purposes other than the intended training and internal quality control.

6. Implementation cost estimates for new logging systems varied widely (from a low of $400 to as much as $15,000) and the responses seemed in part to depend on the respondent's existing level of technical sophistication. Part of the problem of estimating costs is also due to the lack of any technical standard in the Notice. CBI member estimates were based on varied assumptions about the recording medium (ranging from analog audio cassettes or video tapes to high-end digital media servers) and format (respondents used various compression and coding schemes in estimating digital file sizes). All of the estimates submitted to CBI were from radio station members. Compliance with the proposed regulations would be comparatively more cost-prohibitive for television licensees than for radio licensees, due to the differential in technology costs, though the financial burden would be excessive in each case.

7. Using a mean figure of $8,000 for the first-year cost of hardware, software, and installation labor, the cost is excessive. That figure exceeds the annual capital and equipment budgets for many college stations and would take the majority of the operational budgets at many others. Spending the limited funding available on a program logging system would force licensees to forego other equipment purchases and would reduce the station's ability to serve their community with local, diverse programming.

8. The cost estimates CBI received from member stations did not take into account any need for redundancy. A logging system malfunction might expose the licensee to penalties for failure to comply with any rules adopted under this Notice. Given the potential legal liability for stations under the proposed requirements, any logging system mandate would really be a requirement for the acquisition and

maintenance of two independent logging systems, in order to protect licensees against the inevitable human and technical failures. This factor would double the costs and operational overhead for stations, and greatly compound the service issue noted in the previous paragraph. In some instances, the costs could cause stations to cease operations altogether.

9. Many college broadcasters operate with one or two nominally full-time employees, or fewer, and rely primarily on student and community volunteers to staff the stations. Those employees and volunteers have a tremendous number of responsibilities inside and outside the station. Indeed, few employees are probably able to devote a full-time workweek solely to station operations, being also responsible for teaching, administration, and other jobs at their institutions. It is unreasonable to ask licensees that have never been found guilty of violating 18 U.S.C. § 1464, or that have even been subject to a letter of inquiry, to take on several hours a week of additional work to maintain a program logging system of questionable value.

10. Volunteers solely operate other college stations. The additional onerous burden of maintaining a logging system would likely overburden licensees that otherwise comply with the Commissions rules and offer valuable service to their communities. At minimum, the net effect of this rule on these licensees would be a reduction of service to the community caused by the increased consumption of volunteer resources. The adoption of the regulations proposed under this Notice is likely to unintentionally thwart the Commission's efforts elsewhere to encourage and foster local programming, the hallmark of most college station licensees.

11. A generalized, full-time logging requirement effectively penalizes licensees never found to be in violation of any content rule, including the prohibition against obscene, indecent, or profane speech (or, indeed, licensees that have never even been the subject of such a complaint). At most, a logging requirement for a specified term (perhaps one or two years) might be appropriate as part of a sanction for a licensee found to have violated 18 U.S.C. § 1464 during a license term.

The Proposed Requirements Potentially Create Numerous Legal Problems for College Licensees.

12. Although most CBI member stations originate the majority of their programming locally and retain the intellectual property rights to such programming, some stations may also carry network or syndicated offerings. Contracts for those program services generally permit the station to broadcast the particular program a specific number of times within a specific time window. The retention and distribution of recordings of those programs–including recording and distribution in response to regulatory requirements not envisioned when such programming agreements were entered into–would violate those contracts and potentially open licensees to legal sanctions. The Commission is not empowered to override such private legal agreements and should not adopt regulations effectively forcing licensees to violate established agreements.

13. In addition, some locally-originated programming (e.g., live music concerts or campus speakers) might also be subject to contractual obligations limiting the station's rights to distribute it to a narrow broadcast window.

14. A number of other legal issues and potential problems for stations are not mentioned in the Commission's proposal. For example, this requirement would involve making an additional copy of musical works and other sound recordings, something not envisioned by Congress or the Copyright Office and not covered in current contractual agreements among copyright owners, performing rights organizations, and licensees. Stations making and distributing programming logging recordings could be in violation of provisions regarding digital ephemeral copies as well as other statutes and regulations.

15. For public institutional licensees, logging recordings might be considered public records. This would subject them to requests from the general public, compounding the burden for licensees. Copyright owners may also be deprived of royalties if the public can acquire copies in this manner.

16. Finally, it is always difficult to foresee every legal eventuality resulting from a rule change such as this. Many college broadcasters operate with limited access to institutional legal counsel and with very limited financial means with which to retain alternative outside legal counsel. Again, the adoption of this rule is likely to force licensees to forgo other uses of their limited resources, uses that would more directly benefit a much larger portion of their community. Risk-averse licensees may simply decide the actual and potential costs are no longer worth the accompanying risk and cease operations in order to reduce exposure, thus depriving listening and viewing communities of existing program diversity.

The Proposed Requirements are Unconstitutional.

17. The Commission seeks comment on whether the proposed requirements raise First Amendment issues. CBI believes that they are overly broad; that they would create a significant chilling effect, especially if recordings were also to be used for purposes other than investigating 18 U.S.C. § 1464 complaints; that requiring broadcasters to keep recordings and make them available in possible criminal investigations is also contrary to the Fifth Amendment; and that any such requirements would be unconstitutional.

18. A regulation directed at constitutionally protected speech (such as the proposed requirements here) must serve a compelling government interest and be narrowly tailored to further that interest. Assuming, for argument's sake, that the Commission can demonstrate that the proposed regulations serve a compelling interest,[3] a regulation that substantially burdens 100% of licensees to serve a regulatory interest triggered by 1% (or less) of licensees is not, in any sense, narrowly tailored.

19. In 1975, the FCC promulgated a similar rule, requiring federally-funded noncommercial educational radio and television stations to make audio recordings of all broadcasts of any discussion of

[3] CBI is not conceding this point, however.

an issue of public importance.[4] The licensees were required to retain the audio recordings for 60 days, and to provide a copy to any agent of the Commission who requested one, or to any member of the public within seven days of receiving a request and upon payment of reasonable costs.

20. An *en banc* decision by the D.C. Circuit Court of Appeals vacated the rule as a violation of both the First and Fifth Amendments to the Constitution.[5] That retention rule, applied only to non-commercial educational stations and only to public affairs programming, was far less broad than any version of the proposed rule here. When considering whether the rule should be applied to all broadcasters, the Commission found credible evidence of a chilling effect, and decided that the costs outweighed any public benefit.[6]

21. The chilling effect on protected speech is no less present here. As in the *Community Service Broadcasting* case, the concern is "not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves."[7] CBI received responses to the survey of member stations that raised this likelihood. The specter of substantial government involvement in programming looms large. Even if the Commission's authority attached to any requirement of logged programs is limited solely to enforcing 18 U.S.C. §1464, the proposed requirements would discourage stations from offering the kinds of diverse programming the Commission is actively trying to encourage in other proceedings.

22. The proposed requirements would become even more problematic were they to be applied to programming offered through channels other than free, over-the-air broadcasts. The courts have repeatedly held that any rules affecting First Amendment rights in those distribution channels are subject

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[4] 57 F.C.C.2d 19 (1975).

[5] Community Service Broadcasting of Mid-America v. Federal Communications Commission, 593 F.2d 1102 (D.C. Cir. 1978).

[6] *Id.* at 1114, fn. 26 (citing 64 F.C.C.2d 1100, 1113-1114 (1977)).

[7] *Id.* at 1116.

to greater scrutiny than is afforded broadcasters. The Commission's interest in regulating indecent or profane content on these channels is markedly less than in the case of broadcasting.

If the FCC Adopts Program Recording Requirements the Scope of the Rules Should be Limited.

23. The proposed requirements are overly burdensome, unprecedented, unanticipated, and clearly detrimental to licensees' ability to serve their local communities in the public interest. Should the Commission nevertheless decide to implement a program logging rule, CBI believes the following elements must be included to minimize the harm to non-commercial educational broadcasters and the local communities they serve:

a. Non-commercial educational licensees with fewer than six full-time employees should be exempt from the requirements[8] unless they have been found liable for violating 18 U.S.C. § 1464 during the license period.

b. The retention period must be no longer than necessary for notification to a licensee of a complaint. A rule requiring simultaneous notification of the station and the Commission of any complaint about programming, with a proof of delivery requirement (such as certified mail or Federal Express), could reasonably reduce this period to as little as 14 days.

c. The rule must not make the recordings part of the station's public file. Recordings should only be available to station personnel, and to the FCC following a complaint.

[8] *See* In the Matter of Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 6 FCC Rcd 2111 (1991) (NCE stations are exempt from record keeping and filing requirements because the costs far outweighed the benefits).

d. Recordings must be used by the Commission only to substantiate or refute complaints about obscene, indecent, or profane programming.

e. For licensees that are agents of state or local governments (including colleges, universities, and local school boards) the rule must hold that the recordings are not "public records" within the meaning of that term under applicable state law.

f. The technical standard for recordings should be left to individual licensees, subject only to a requirement that the content be reasonably audible (for radio) and reasonably audible and visually clear (for television).

Conclusion.

24. For all of the forgoing reasons, CBI strenuously opposes the Commission's adoption of the regulations proposed in this Notice.

Respectfully Submitted,

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